

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF OF APPELLANT AND JOINT APPENDIX

411

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 21,830

FILED MAY 27 1968

BLANCHE H. LOBER,

Appellant

Nathan J. Paulson
CLERK

v.

WILLIS MOORE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROLAND D. HARTSHORN
1726 Eye Street, N. W.
Washington, D. C.
Attorney for Appellant

(i)

STATEMENT OF QUESTIONS PRESENTED

I

Whether the judgment of the Circuit Court of Arlington County, Virginia, in favor of the Arlington Yellow Cab Co., Inc., the sole defendant appearing before the said Court as a party to that cause, was *res judicata* as to the present action against Willis Moore, who was the operator of the taxicab in which the Appellant, Blanche H. Lober, was injured where Appellee was not a party defendant to that cause and not subject to the liabilities of any judgment rendered by said court and furthermore had not been found within the jurisdiction of the said Court.

II

Whether under Virginia law and the decisions of its Courts, which permit the filing of joint or separate actions against joint and several tort feasons and to proceed successively to judgment against each of them, the Appellant is authorized to proceed on the merits of this action in the Court below.

III

Whether, under appropriate law and decisions, Willis Moore was as a matter of law an identical party to the action in the Circuit Court of Arlington County, Virginia, and sufficiently in privy thereto so as to be subject to the judgment of that Court and entitled to interpose the plea of *res judicata* in this case.

(iii)

INDEX

JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES AND RULES INVOLVED	3
STATEMENT OF POINTS ON APPEAL	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	15

CITATIONS

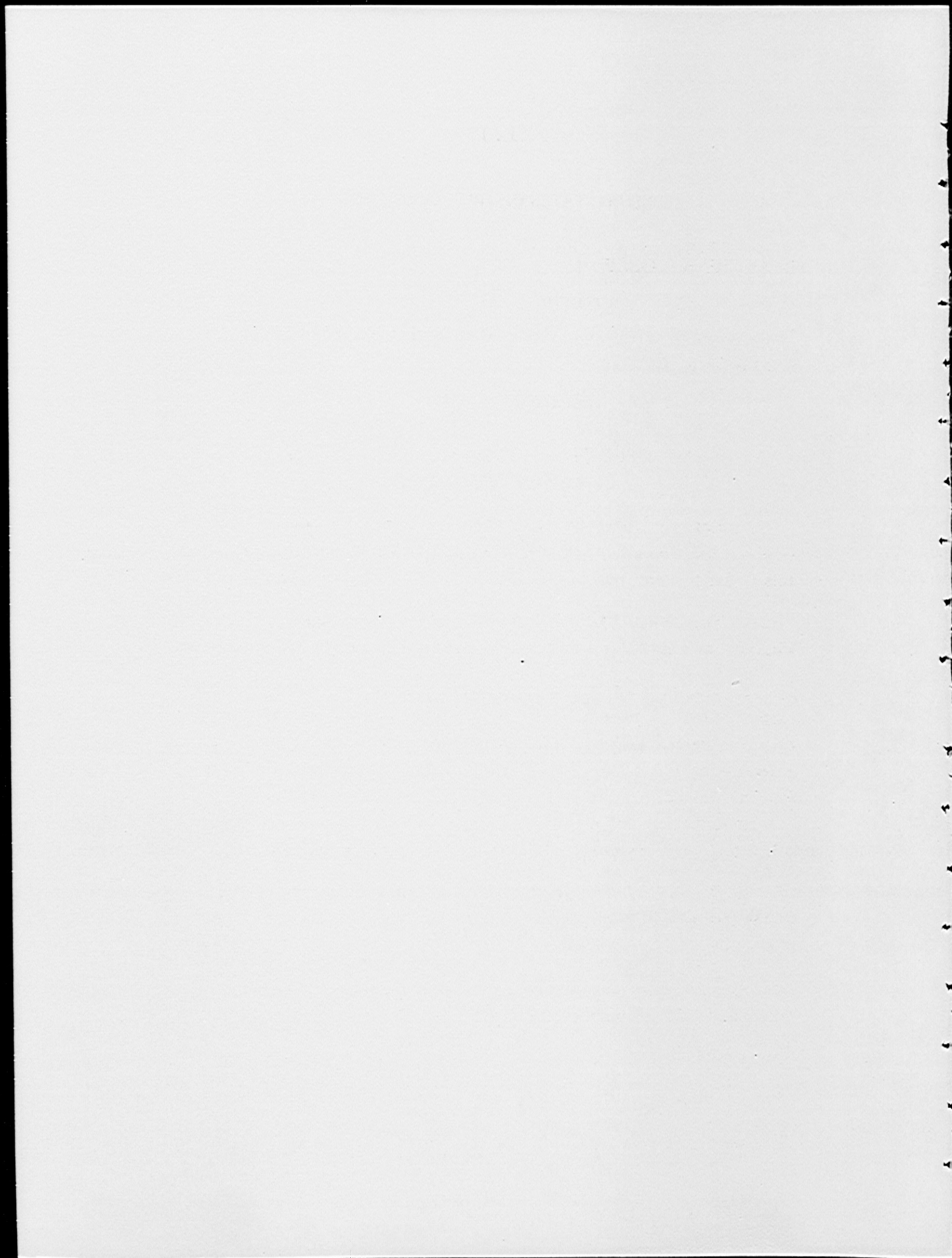
CASES:

Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 32 S. Ct. 641, 56 L.Ed. 1009	10
Ferrebee v. Hungate, 192 Va. 32, 63 S.E.2d 761	9-10
*Fitzgerald v. Campbell, 131 Va. 486, 109 S.E. 308	7, 8
*Gordon v. Board of Supervisors of Fairfax County, decided March 6, 1967, 207 Va. 827, 153 S.E.2d 270	13
Graves v. Associated Transport, Inc. (4th Cir.), 344 F.2d 894	11, 13
Kinsley v. Markovic (4th Cir.), 333 F.2d 685	11
Patterson v. Anderson, 194 Va. 557, 74 S.E.2d 195 (1953) ..	13, 14
Patterson v. Saunders, 194 Va. 607, 74 S.E.2d 204	11, 14
*Pittston Co. v. O'Hara, 191 Va. 886, 63 S.E.2d 34	9, 12
Ward v. Charlton, 177 Va. 101, 12 S.E.2d 791	12

STATUTES AND RULES:

Code of Virginia, Section 8-368	9
Federal Rule of Civil Procedure 19(b)	11, 14

*Cases chiefly relied on.



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,830

BLANCHE H. LOBER,
Appellant

v.

WILLIS MOORE,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is invoked under Title 28, United States Code, Sections 1291 and 1294, to review the final order of judgment entered in the United States District Court for the District of Columbia on February 23, 1968, Judge Holtzoff, presiding. The Court below granted Appellee's motion for summary judgment on a plea of *res judicata* and entered a final order thereon, from which order this appeal is taken.

STATEMENT OF THE CASE

The facts of this case are substantially established by the pleadings, the exhibits, the motions and the opposition to the motion and other reasonable conclusions drawn from the pleadings and exhibits.

On the afternoon of December 18, 1964, Appellant was riding as a paying passenger in a taxicab operated by Appellee, Willis Moore, and owned by the Arlington Yellow Cab Co., Inc., a taxicab company located in Arlington County, Virginia. She was a passenger of a common carrier to whom the said Appellee owed the duty to exercise the highest degree of care for her safety. On the said date, as the said taxicab was traveling eastward on F Street, Northwest, in the District of Columbia and entering the intersection of 12th Street, Northwest, Appellee negligently operated the said taxicab by failing to keep a proper lookout ahead, in failing to keep his vehicle under proper control and in failing to observe the signals of the police officer on duty at the said intersection; and as a result of Appellee's negligence whereby he suddenly, recklessly, carelessly and negligently brought his vehicle to an abrupt stop and thereby threw Appellant about in the rear seat and floor so as to cause to her severe injuries, more detailed in the pleadings and not essential to this appeal (JA 1). In answer, Appellee denied negligence, alleged sole or contributory negligence on the part of Appellant, and pleaded *res judicata* as a special defense, which last defense is the basis of the Motion Summary Judgment. The judgment upon which the plea of *res judicata* is based is the case of *Blanche H. Lober v. Arlington Yellow Cab Company, Inc.*, Law No. 11,012, In the Circuit Court of Arlington County, Virginia, in which the Court entered judgment upon the verdict of the jury in general form in favor of the Defendant therein, Arlington Yellow Cab Co., Inc. alone. (JA 3).

Appellee does not question that the accident happened on December 18, 1964, at or near the intersection of 12th and F Streets, N.W., in Washington, District of Columbia; that Appellee was operating said vehicle and Appellant was a paying passenger therein; that Appellee was not served with process in the Arlington Circuit Court case and did not appear therein as a party but only as a witness for the sole Defendant, Arlington Yellow Cab Co., Inc.; that Appellee was not legally represented therein and Appellee did not participate therein as a party litigant; or that the judgment entered in that case was in favor of the Arlington Yellow Cab Co., Inc. alone. (JA 5).

The facts further show that the suit filed in Arlington County, Virginia, originally named Appellee as a party and that a return was made that he was "not found", and the Court therein allowed the cause to proceed against the sole defendant subject to the Court's jurisdiction, Arlington Yellow Cab Co., Inc. (JA 5).

STATUTES AND RULES INVOLVED

I. *Title 8, Code of Virginia, 1950, as amended, Section 368,* which provides in part:

"...the injured party may bring separate actions against the wrongdoers and proceed to judgment in each, or, if sued jointly, he may proceed to judgment against them successively until judgment has been rendered against, or the cause has been otherwise disposed of as to, all of the defendants, ..."

II. *Rule 19(b)*, of the *Federal Rules of Civil Procedure*, which provides in part:

“(b) *Effect of Failure to join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the Court of jurisdiction of the parties before it, the Court shall order them summoned to appear in the action. The Court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.”

STATEMENT OF POINTS ON APPEAL

1. The Court below erred in granting judgment for Appellee upon Appellee's Motion for Summary Judgment below.
2. The judgment of the Circuit Court of Arlington County, Virginia, in favor of the Arlington Yellow Cab Co., Inc. was not *res judicata* as to the present case, nor did it estop or bar this action.
3. Both the statutory authority of the State of Virginia and Rule 19, of the Federal Rules of Civil Procedure permit Appellant to proceed to judgment against Appellee.
4. The law of Both said forum permit this suit to proceed to judgment on the issues.

SUMMARY OF ARGUMENT

Appellant attempted to bring suit against both Arlington Yellow Cab Co., Inc., and Appellee, Willis Moore, in the Circuit Court of Arlington County, Virginia, but Appellee was not served with process and said process was returned to the Court as "not found" as to Appellee. That Court allowed the case to proceed against the sole defendant remaining therein, Arlington Yellow Cab Co., Inc., the only defendant subject to the jurisdiction of that court. Appellee did not voluntarily appear in that cause or otherwise appear therein as a party or submit himself to the jurisdiction of the court and participate in the case as a party defendant. He was therefore not subject to the liabilities of any judgment of that court and accordingly, Appellee is not entitled to plead and rely upon the defense of *res judicata* either under Virginia law or the Federal Rules. As determined by the Courts of Virginia, Appellee was not privy to the Virginia action nor otherwise bound by its judgment.

Virginia law specifically grants to the Appellant the right to bring either separate suits or joint actions against multiple defendants and to proceed to judgment either jointly or successively, and although this is contrary to the views of other jurisdictions, it is the rule of the jurisdiction controlling this issue. Furthermore, while the "modern" view of the doctrine of *res judicata* tends to look for identity of issues and gives little weight to the fact that the party pleading the doctrine was not a litigant before the prior court, Virginia specifically requires under its doctrine the unity of identical issues, identical parties and identical positions of the litigants.

This case is further distinguished from the cases previously cited for Appellee in that the Virginia court did not have jurisdiction over the person of the Appellee and for that reason alone, even under Federal Rules, Appellant is entitled to proceed against Appellee in the Court below. For these reasons, the judgment of the Court below should be reversed and trial on the issues allowed.

ARGUMENT

Appellee conceded in the Court below that the rights of Appellant to proceed against Appellee insofar as the plea of *res judicata* is concerned should be determined under the law of Virginia. That law is to be determined from the statutory authority of that State and the decisions of its highest court, the Supreme Court of Appeals of Virginia. To this concession, which Appellant for purpose of this argument assumes, Appellant agrees that the law and decisions of the State of Virginia are controlling on the issue of the plea of *res judicata*. However, Appellant further urges in this argument that under the circumstances of this case, the Federal Rules of Civil Procedure would also permit Appellant to maintain the action in the court below and to proceed to judgment on the merits of the case. In presenting this argument, Appellant urges the following matters.

I

Whether the judgment of the Circuit Court of Arlington County, Virginia, in favor of the Arlington Yellow Cab Co., Inc., the sole defendant appearing before the said Court as a party to that cause, was *res judicata* as to the present action against Willis Moore, who was the operator of the taxicab in which the Appellant, Blanche H. Lober, was injured where Appellee was not a party defendant to that cause and not subject to the liabilities of any judgment rendered by said court and furthermore had not been found within the jurisdiction of the said Court.

In answer to this question the decided weight of the authorities of the State of Virginia is against the allowance of a plea of *res judicata* in favor of the Appellee. In the first place, it would be unfair to Appellant or any other plaintiff who has been able to secure

process on the principal alone for a judgment favorable to that principal to be likewise given favorable benefit to the absent servant who was the actual tortfeasor. Common sense dictates that a jury is less inclined to render judgment against the principal alone whereas the same jury might have no difficulty in assessing liability on the tortfeasor himself. To refuse to allow Appellant to now proceed against the tortfeasor, found later in this jurisdiction, would place a plaintiff in an arbitrary position of having to proceed against the weakest case, and the more remote defendant at the risk of thereby freeing the more culpable defendant by an adverse judgment in favor of the party whose liability arises from a secondary nature. This matter has been clearly pointed out in the case of *Fitzgerald v. Campbell*, 131 Va. 486, 109 S.E. 308, 309, 311, wherein the Court said:

“...Section 6164 of the Code, so far as material, is as follows:

‘A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each . . . and no bar shall arise as to any of them by reason of a judgment, against another, or others, until the judgment has been satisfied. . . .’

“Prior to this statute the rule on the subject in Virginia was the same as that in England, being that a judgment against one of several joint wrongdoers, whether satisfied or not, was a bar to any action against the others

“This section is new. . .and the new section makes this view statutory in Virginia, the revisors being of opinion that the bar should not fall until there has been a satisfaction of the wrong done.” . . .

“...the party injured may bring separate suits against the wrongdoers, and proceed to judgment in

each, and that no bar arises as to any of them until satisfaction is received. . . . But he (the plaintiff) can claim or enforce only one satisfaction for the same injury;"

"This brings us to the question of what is the legal satisfaction contemplated by the rule above noticed. The authorities generally hold that the plaintiff may prosecute separate actions against joint wrongdoers to final judgments, if in the meantime he has not received satisfaction for the injury from any source Otherwise, one joint wrongdoer, or all of them acting in concert through the one, or the clerk, might in fact exercise the election which the law says the plaintiff has the right to make, and thus defeat the very object of the rule giving the plaintiff the right to maintain separate actions, and prosecute them to final judgments

"It is well said in the last case cited: 'were the law otherwise, it would enable joint trespassers who were sued separately to hasten the trial of the one lesser guilty among them, and, by satisfying in the clerk's office the damages against him, to free themselves from all responsibility for their own great guilt'."

This same principle applies to the present case, that is, the Appellant had the right to pursue separate actions as well and that likewise, refusal to allow this would cause Appellant to have to pursue remedy against one lesser guilty to her detriment.

Certainly the language of the present statute is as broad if not broader than that in force at the time of the *Fitzgerald* case.

II

Under the provisions of Section 8-368 of the Code of Virginia, 1950, as amended, and the decisions of the Supreme Court of Virginia, Appellant had the perfect right to proceed to judgment in the case in the Circuit Court of Arlington County, Virginia, without being deprived of her right to proceed successively against the Appellee in the United States District Court for the District of Columbia.

In the case of *Pittston Co. v. O'Hara*, 191 Va. 886, 63 S.E.2d 34, 43, the Court treated this matter both as to the doctrine of estoppel and *res judicata*, saying in part as follows:

"... The lower court, in its decrees. . . adjudicated that The Pittston Company should pay interest on the ascertained fair cash value of the stock 'of all of the dissenters', and that that company did not appeal from such adjudication.

(To another dissenter's plea that this decision was *res judicata* on the company, dissenter not being a party to the prior action) the court said:

"This argument overlooks two fundamental essentials in the application of the doctrine of *res judicata*: (1) It applies only to parties to the proceeding and their privies; and (2) The estoppel must be mutual. If one who asserts the estoppel was not a party to the prior proceeding and is not bound by the judgment relied on, the adverse party is likewise not bound"

". . . these dissenters were not parties. Hence, we said, the . . . decree was not *res judicata* as to or binding on these dissenter It necessarily follows that in so far as their rights are concerned, it likewise does not so operate against their adversary. The Pittston Company." (Also see, *Ferrebee v. Hungate*,

192 Va. 32, 63 S.E.2d 761, 764). Therein the party seeking to impose the plea of res judicata was described as not a party, having no right to control the proceedings, to make defense or cross examine witnesses or appeal the decision and was therefore a stranger to that suit.

In the present case, Appellee was a stranger to the suit in the Circuit Court of Arlington County, Virginia. He was merely a witness for the sole defendant there, the Arlington Yellow Cab Co., Inc. and as such was not a party to the case, had no right to control or participate in the control of the proceedings, to make defense, to cross-examine witnesses or to appeal the decision of the court had same been adverse to his interests, and most important, he was not bound by same.

In *Bigelow v. Old Dominion Copper Mining & Smelting Company*, 225 U.S. 111, 32 S.Ct. 641, 56 L.Ed. 1009, 1021, the Court cogently stated:

"...To conclude Bigelow by the New York judgment, it must appear that he was either a party or a privy. That he was not a party to the record is conceded. He had no legal right to defend or control the proceedings nor to appeal from the decree. He was therefore a stranger, and was not concluded by that judgment as a party thereto. That he was indirectly interested in the result because the question there litigated was one which might affect his own liability as a judicial precedent in a subsequent suit against him upon the same cause of action is true, but the effect of a judgment against Lewisohn as a precedent is not that of res judicata, and the Massachusetts court was under no obligation to follow the decision as a mere judicial precedent. Nor would assistance in the defense of the suit, because of interest in the decision as a judicial precedent which might influence the decision in his own case, create an estoppel as to Bigelow."

In Virginia, the same principle has been adopted. The term privy when applied to a judgment or decree refers to one whose interests has been legally represented at the trial. *Patterson v. Saunders*, 194 Va. 607, 74 S.E.2d 204, 208, 209. The Court of Appeals for the Fourth Circuit, while acknowledging that the law of Virginia applies in determining whether a plea of res judicata should be sustained, has completely ignored the overwhelming weight of authority which would deny the plea in this case. In addition to the decisions of Virginia courts, the circumstances of this case, that is, the failure of attaining service on the Appellee, his own failure to voluntarily submit himself to the court's jurisdiction and participate in the Arlington action as a party, his being subject to the Court below, another jurisdiction, and the fact that he was not bound by the decision of the Arlington court, places him squarely within the scope of Rule 19(b) of the Federal Rules of Civil Procedure and Appellant urges that this alone under federal rules would give to Appellant the right to proceed to judgment on the merits of the case, it appearing under said rule that neither Appellee's rights or liabilities were affected by the Arlington judgment. In *Kinsley v. Markovic* (4th Cir.) 333 F.2d 685, relied upon by Appellee as being on all fours, it is noted that the defendant in that case, that is, the cab driver, had not been named as a defendant in the prior action. It is equally well to note that the Kinsley case was also brought in Virginia, thereby indicating that both parties could have been summoned in the prior action. Obviously, the Circuit Court of Appeals there applied Rule 19 strictly rather than Virginia law, particularly in view of the fact that the plaintiff had made no effort to make their defendant a party to the first action. Certainly the present case is distinguishable by virtue of the fact that Mrs. Lober did try to make the Appellee a party to the original action without success. But more important that court in the Kinsley case, supra, erroneously interpreted the Virginia law as did the same Court in the case of *Graves v. Associated Transport, Inc.*, (4th Cir.) 344 F.2d 894. In

this case, the Court completely ignores all Virginia precedent, acknowledges that the Virginia law applies and says that had this case been presented to the Supreme Court of Appeals of Virginia ten years prior they would have decided in favor of Appellant's position (see p. 896). The federal appellate court further avers that Virginia has no authority on point, an assumption not supported by prior decisions and the decisions in fact cited in their own opinion, but it seeks to place its own notions of the law on record as the law of Virginia. While this decision was handed down in 1965, hardly ten years before the courts of Virginia had squarely adopted the fundamental doctrine of res judicata requiring both identical parties and mutual estoppel, that is, the party asserting res judicata as well as the other party must be bound by the former judgment. *Pittston v. O'Hara, supra*. The only cases of record where the Virginia Courts have considered the allowance of unilateral estoppel or res judicata has been in a case where the driver of the vehicle was sued and found not liable in the former judgment. Therein the court pointed out that this exception was allowed inasmuch as there had been a judicial determination that the plaintiff had not been entitled to recover against the operator of the car, he would not be allowed to recover against the owner of the car *because the liability of the owner is necessarily predicated upon the negligence of the operator* (italics ours). *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791. The position there was logical inasmuch as the primarily responsible person was the first party sued and there was no likelihood that the jury rendered a verdict in favor of a party secondarily liable on sympathy or otherwise, nor that the defendants, separately or in privy, or the fact that process could not be secured against the person primarily liable operated adversely against the plaintiff there. So, it is urged that the Court should review the findings of the Virginia Court of Appeals, the law of Virginia, and render judgment, not upon the modern or enlightened views, whatever they may be, upon the authorities and views of past decisions of the Supreme Court of

Appeals, the only guides available for the determination of Virginia law.

III

The decisions of the Supreme Court of Appeals of Virginia has adopted the position that res judicata would not be a defense against Appellant.

Not only is this supported by the laws of Virginia heretofore cited but also by the recent decisions of the Court. While the United States Court of Appeals for the Fourth Circuit was deciding that the Supreme Court of Appeals of Virginia would not reject the fundamental concepts of the doctrine of res judicata and apply the more "enlightened" view that the party asserting same would not be required to be in privity or required to be the identical person and parties in the identical capacities in which they appeared in the former action, a case shortly thereafter arose in the State of Virginia wherein the Supreme Court of Virginia had the opportunity to enunciate their position again. In the case of *Gordon v. Board of Supervisors of Fairfax County*, decided March 6, 1967, 207 Va. 827, 153 S.E. 2d 270, 274, two years after *Graves*, supra, the Court said in part as follows:

"It is essential to the application of the doctrine of res judicata that the identical issue sought to be relitigated has been settled by a valid final judgment in a proceeding to which the identical persons or their privies were parties in the identical capacities in which they appear in the later litigation." (citing *Patterson v. Anderson*, 194 Va. 557, 74 S.E. 2d 195, 200 (1953).

Strangely enough, following the opinion of *Patterson v. Anderson*, supra, the Supreme Court of Appeals of Virginia rendered on the same day, January 26, 1953, its opinion in the case of *Patterson v. Saunders*, supra, firmly establishing that one in "privity" when applied to a judgment or decree of a court means one whose interest has been legally represented at the trial.

CONCLUSION

Appellant concludes in urging that the overwhelming weight of authority in Virginia, supported by Rule 19 of the Federal Rules of Civil Procedure, dictates that the judgment of the court below sustaining the Appellee's Motion for Summary Judgment on the plea of *res judicata* should be reversed and the case tried on the merits.

For the reasons hereinbefore set forth, it is respectfully submitted that the Order of judgment of the Court below was in error and should be reversed and that this cause be remanded to the Court below for trial on the merits.

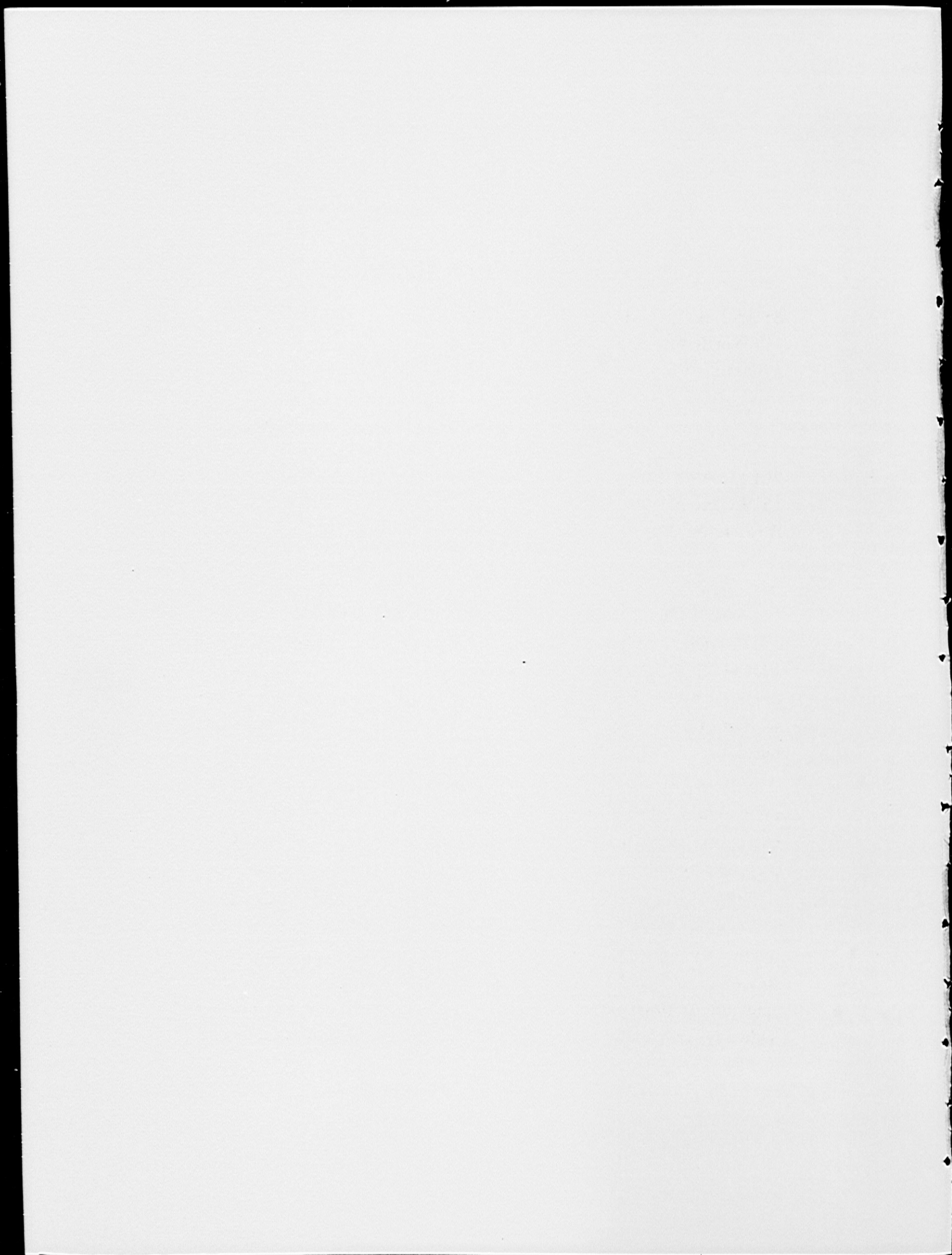
Respectfully submitted,

Roland D. Hartshorn
1726 Eye Street, N. W.
Washington, D. C.
Attorney for Appellee

(i)

CONTENTS OF JOINT APPENDIX

Complaint for Damages	1
Answer to Complaint	3
Motion for Summary Judgment	4
Exhibit A - Notice of Motion for Judgment	6
Exhibit B - Instruction 12	8
Exhibit C - Motion to Set Aside Verdict, etc.	11
Exhibit D - Order of June 19, 1967	15
Opposition to Motion for Summary Judgment	17
Order, Holtzoff, J.	19
Notice of Appeal	19



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLANCHE H. LOBER,
711 North Wayne Street
Arlington, Virginia

v.

Civil Action No. 1779-67

WILLIS MOORE,
1523 22nd Street, N.W.
Washington, D. C.

COMPLAINT FOR DAMAGES
(Personal Injuries)

1. On or about the afternoon of December 18, 1964, plaintiff, BLANCHE H. LOBER, was a paying passenger riding in a taxicab operated by the Defendant, WILLIS MOORE, at or near the intersection of 12th and F Streets, N. W., Washington, District of Columbia.

2. At the said time and place, the said defendant was operating a common carrier for hire and owed to the plaintiff the duty of exercising the highest degree of care for her safety and to avoid injury to plaintiff.

3. As the said taxicab entered into the said intersection, the said defendant operated the said taxicab in a negligent and careless manner by failing to keep a proper lookout, to keep the vehicle under proper control and to observe signals of the officer on duty at the said intersection and as a result of the aforesaid, said defendant suddenly, recklessly, negligently, carelessly, violently, unusually and

abruptly stopped the said taxicab in such an extraordinary and lurching manner as to bodily throw plaintiff from the rear seat of said taxicab, into and against the rear of the front seat and onto the floor of said taxicab, proximately causing injuries to plaintiff hereafter set forth.

4. As a result of the aforesaid negligence on the part of the said defendant, plaintiff suffered severe and disabling personal injuries including cervical strains and sprains, contusions and sprains of the left shoulder, effusions and abrasions of the left knee and strains of the chest areas causing plaintiff to suffer great bodily pain and mental anguish, temporary and permanent disability, inconvenience and loss of her normal social activities and medical and doctors bills and expenses exceeding \$2,000.00, all of which has damaged and injured plaintiff in the amount of \$50,000.00.

WHEREFORE, plaintiff, BLANCHE H. LOBER, demands judgment against the defendant, WILLIS MOORE, in the amount of \$50,000.00, with interest and costs of this action.

BLANCHE H. LOBER
By Counsel

Roland D. Hartshorn
Attorney for Plaintiff

Plaintiff demands trial by jury on all issues.

Roland D. Hartshorn

ANSWER TO COMPLAINT

FIRST DEFENSE

The complaint fails to state a claim against the defendant upon which relief may be granted.

SECOND DEFENSE

The defendant admits the occurrence of an accident while the plaintiff was a passenger in a taxicab operated by him, but defendant denies all allegations not specifically admitted or otherwise met in this Answer.

THIRD DEFENSE

Such injuries, losses and damages as the plaintiff may have sustained were due to her sole or contributory negligence.

FOURTH DEFENSE

This action is barred by the doctrine of res judicata, the matter in issue here having been decided in the case of Blanche H. Lober v. Arlington Yellow Cab Company, case number 11012 in the Circuit Court for Arlington Court, Virginia, wherein the principal of the present defendant was the defendant.

O'BRIEN AND CLAGUE

William Clague
Attorneys for the Defendant

[Certificate of Service]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Willis Moore, and moves the Court to grant Summary Judgment herein, for the reason included in the Fourth Defense herein, that this action is barred by the doctrine of res judicata. This case is the same case as that styled Blanche H. Lober v. Arlington Yellow Cab Company, Inc., Law No. 11012, previously tried and concluded by judgment for the defendant in the Circuit Court of Arlington County, Virginia, wherein the principal of the present defendant prevailed and obtained judgment in this matter. There is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

Defendant incorporates his Memorandum, Statement of Points as to Which There Is No Material Issue, Memorandum of Points and Authorities, Affidavit and Exhibits in this Motion as is fully set out herein.

O'BRIEN AND CLAGUE

/s/ William Clague

[Certificate of Service]

[Filed]

**STATEMENT OF MATERIAL FACTS AS TO
WHICH MOVING PARTY CONTENDS
THERE IS NO GENUINE ISSUE**

1. The accident complained of herein occurred on December 18, 1964 at or near 12th and F Streets, N.W., Washington, D.C. when plaintiff was a passenger in a cab operated by Willis Moore defendant herein, (See Complaint, paragraph 1).

2. The accident referred to in the above paragraph is the same occurrence referred to and made the subject of case Law No. 11012 in the Circuit Court of the County of Arlington, Virginia, styled Blanche H. Lober v. Arlington Yellow Cab Company, Inc. and Willis Moore. (See Exhibits A, A1 & A2)

3. Willis Moore was not served with process in said Law No. 11012, but did appear and testify.

4. In Law No. 11012, notwithstanding the fact that the defendant, Arlington County Yellow Cab Company, Inc. denied that Willis Moore was its agent, the Court held that the said Willis Moore was the agent of the Arlington Yellow Cab Co., Inc., and so instructed the jury when the case was submitted to them. (See Exhibit B & B1 a Copy of the said "Instruction 12" under Triple Seal).

5. That after adverse verdict the plaintiff in Law No. 11012 filed a "Motion to Set Aside Verdict, etc.", stating in part that " * * * the evidence and admissions of record established the relationship of principal and agent between the defendant and the driver of the taxicab in this case; the scope of employment and authority to transport plaintiff as a common carrier was acknowledged; * * * ." (See Exhibit C, C1, C2, C3.)

6. That after hearing on said Motion to Set Aside Verdict, etc. the Court denied the same and entered an Order to that effect on June 23, 1967. (See Exhibit D, D1.)

O'BRIEN AND CLAGUE

/s/ William Clague

[Exhibit A]

Commonwealth of Virginia

MAR 2 8 1965
 IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

NOTICE OF MOTION FOR JUDGMENT Law No. 11012

To:

✓
 ARLINGTON YELLOW CAB COMPANY, INC.
 A CORPORATION
 5624 Lee Highway
 Arlington, Virginia

Served
March 3

and

WILLIS MOORE
 S ARLINGTON YELLOW CAB CO., INC.
 5624 Lee Highway
 Arlington, Virginia

not found

You are hereby notified that unless within twenty - one [21] days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 1st day of March, 19 65

E. BRUCE GREEN

CLERK.

BY

Virginia Chen

DEPUTY CLERK.

ANDREW A. HENDERSON
 2400 Wilson Boulevard
 Arlington, Virginia

P. Q.

(OFFICE ADDRESS)

MOTION FOR JUDGMENT

TO: THE HONORABLE JUDGES OF THE SAID COURT

Your Plaintiff, BLANCHE H. LOBER, respectfully moves the Circuit Court of Arlington County, Virginia, for a judgment against the Defendants, Arlington Yellow Cab Company, Inc., a Corporation, and Willis Moore, jointly and severally, by reason of the following facts:

1. On or about the afternoon of December 18, 1964, Plaintiff was a paying passenger in a Taxicab owned by the Defendant Arlington Yellow Cab Company, Inc., a Corporation and common carrier, and operated by the Defendant, Willis Moore, as agent, servant and employee of the Defendant Corporation, who was at said time operating said vehicle within the scope of his agency or employment and for the mutual benefit of said Defendant at or near the intersection of 12th Street and F Street, Northwest, Washington, District of Columbia.

2. At the said time and place the said Defendants were common carriers and owed to the Plaintiff the duty to exercise the highest degree of care for Plaintiff's safety and to avoid injury to Plaintiff and were liable to Plaintiff for any damage or injury proximately caused by the failure on the part of the Defendants or either of them to exercise said degree of care or slight negligence on the part of either Defendant.

3. As the said vehicle proceeded on F Street N.W., and approached the said intersection of 12th Street, N.W., the Defendant, Willis Moore, then operating said vehicle negligently and carelessly failed to observe the signal of the traffic officer controlling said intersection until reaching same whereat he suddenly, recklessly, negligently, carelessly, violently, unusually, abruptly slammed on his brakes, thereby stopping in such extraordinary and lurching manner

as to bodily throw Plaintiff off the rear seat and against the back of the front seat and onto the floor of said taxicab so as to proximately cause severe and disabling injuries to Plaintiff as hereafter set forth.

4. As a result of the aforesaid negligence on the part of the Defendants, jointly and severally, Plaintiff suffered severe and disabling cervical strains and sprains, contusion and sprain of the left shoulder, effusions and abrasion of the left knee and loss of the normal curvature of the neck curve causing Plaintiff to suffer great bodily pain and mental anguish, temporary and permanent disability, great inconvenience and loss of normal activities, medical and hospital bills of more than \$1,800.00; all of which Plaintiff avers has damaged and injured her in the amount of \$50,000.00

WHEREFORE, Plaintiff, BLANCHE H. LOBER moves for judgment against the Defendant, Arlington Yellow Cab Company, Inc., and Willis Moore, jointly and severally, in the amount of \$50,000.00 with costs of this action.

Blanche H. Lober
By Counsel

Roland D. Hartshorn
Attorney for Plaintiff

[Exhibit B]

Instruction 12

The jury is instructed that WILLIS MOORE, the driver of the taxicab, was the employee, servant or agent of the defendant, ARLINGTON YELLOW CAB CO., INC., at all times when he was transporting the plaintiff, BLANCHE H. LOBER, on December 18, 1964, and this includes during that time when the said taxicab was at and in the intersection of 12th and F Streets, Northwest, Washing-

ton, D. C., and at said time, he was then about the said defendant's business and acting within the scope of his employment, and any negligence of the said driver, Willis Moore, is chargeable to the defendant, ARLINGTON YELLOW CAB CO., INC.

And if you believe from the evidence and the other instructions of the Court that Willis Moore was negligent and that such negligence was a proximate cause of the injury to plaintiff, then you shall return your verdict for the plaintiff, BLANCHE H. LOBER.

AUTHENTICATION OF RECORD

*Commonwealth of Virginia,
Circuit Court of the County of Arlington.*

I, H. BRUCE GREEN, Clerk of the said Court, do hereby certify that the writing annexed to this Certificate are true copies of the originals on file and of record in said office.

WITNESS my hand and seal of said Court this Twenty-eighth day of

November 19 67

Clerk.

IN RE: BLANCHE H. LOBER,
PLAINTIFF

vs

Law No. 11012

ARLINGTON YELLOW CAB COMPANY, INC.,
A CORP.
WILLIS MOORE,

DEFENDANTS

INSTRUCTION #12

I, WALTER T. MCCARTHY, Judge of the Circuit Court of Arlington County, Virginia, do certify that H. BRUCE GREEN, who executed the foregoing attestation, is Clerk of the said Court, duly appointed and qualified, and the said attestation is in due form of law by the proper officer.

IN TESTIMONY WHEREOF, I hereunto set my hand and seal this Twenty-eighth day of November 19 67

Judge, (Seal).

I, H. BRUCE GREEN, Clerk of the said Court, hereby certify that the HONORABLE WALTER T. MCCARTHY, whose genuine signature is here subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Judge of said Court, duly commissioned and qualified.

WITNESS my hand and seal of the said Court this November 28th day of 19 67

Clerk.

[Exhibit C]

VIRGINIA

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BLANCHE H. LOBER,

Plaintiff

v.

At Law No. 11,012

ARLINGTON YELLOW CAB CO., INC.,

Defendant

MOTION TO SET ASIDE VERDICT AND FOR
JUDGMENT FOR THE PLAINTIFF NOTWITH-
STANDING THE VERDICT; MOTION TO SET
ASIDE VERDICT AND FOR A NEW TRIAL

Comes now the plaintiff, Blanche H. Lober, by Counsel, and moves the Court to set aside the verdict of the jury for the Defendant, Arlington Yellow Cab Co., Inc. and to enter a judgment *non obstante veredicto* for the Plaintiff with a retrial of the issue of damages only; or in the alternative, Plaintiff moves the Court to set aside the said jury verdict and award to plaintiff a new trial on all issues; and in support of the said motions plaintiff sets forth the following grounds of material error, to-wit:

1. The verdict of the jury is contrary to law and fact and is not supported by fact in this cause.
2. The verdict of the jury is contrary to the evidence.
3. There were no real controversies of fact on the issues of liability and the evidence and admissions of record established the relationship of principal and agent between the Defendant and the driver of the taxicab in this case; the scope of employment and authority to transport plaintiff as a common carrier was acknowl-

edged; the carrier-passenger relationship was admitted or established between Defendant and Plaintiff; the duty owed to plaintiff by the defendant and its agent driver to exercise the highest degree of care for the safety of the plaintiff; the sudden, violent, unexpected and unusual stopping of the said taxicab by defendant's driver without warning which proximately caused plaintiff to be injured; the lack of imminent peril or danger to any person and the lack of proof that the driver acted under the impulse of sudden fright therefrom; the admission of the driver that he could have brought the taxicab to a gradual and controlled halt and the driver's explanation or lack of explanation for the sudden stop being without an emergency situation as contemplated by law; the opportunity that the driver had to bring the said taxicab to a gradual halt; the lack of the proper degree of care in keeping a lookout ahead and observing and reacting to what a proper lookout would have discovered; the failure to keep the taxicab under proper control and bring same to a gradual halt in a manner consistent with the care owed to the plaintiff; and the injuries resulting to plaintiff from being bodily thrown from the rear seat onto the floor of the taxicab; all of which facts established liability of the Defendant to the plaintiff for her injuries.

4. The Court erred in refusing to instruct the jury on the issue of lookout as requested by plaintiff in Instruction 3, to which ruling plaintiff duly excepted and noted her grounds therefor.

5. The Court erred in refusing to instruct the jury on the paramount duty of the Defendant as requested by plaintiff in Instruction 4, to which ruling plaintiff duly excepted and noted her grounds therefor.

6. The Court erred in refusing to instruct the jury on the inference of negligence as requested by plaintiff in Instruction 5, to which ruling plaintiff duly excepted and noted her grounds therefor.

7. The Court erred in refusing to instruct the jury as requested by plaintiff in Instruction 8, to which refusal plaintiff duly excepted and noted her grounds therefor.

8. The Court erred in giving Defendant's requested Instruction A, to which plaintiff objected, duly excepted thereto and noted her grounds, the principal of which was that plaintiff had established a prima facie under the law applicable to this case and such instruction was therefore improper and erroneous; and in this case the issue of the mere happening of an accident was a matter to be passed upon by the Court as a matter of law on Defendant's motion to strike and not a matter to be submitted to the jury in this case.

9. The Court erred in giving Defendant's requested Instruction B, to which plaintiff objected, duly excepted thereto and noted her grounds, the principal of which was that no sudden emergency was shown by the evidence nor that the driver was laboring under a sudden emergency when he stopped the taxicab; that it submitted matters to the jury which was not raised by the evidence of this case, that is, avoidance of a more serious accident; that it made ordinary care the test of liability of the defendant contrary to law, all of which materially prejudiced plaintiff's case and confused the jury as to the issues of the case.

10. The Court erred in refusing to allow counsel for plaintiff to cross-examine the witness, Willis Moore, as to his knowledge and understanding of the duty of care that he owed to the plaintiff, it being the purpose of plaintiff to show that said witness did not know and understand that he owed the highest degree of care to plaintiff for her safety; that he had not been properly instructed on his duty to the plaintiff-passenger; that his failure to exercise the highest degree of care for plaintiff's safety was due to his ignorance of his duty to her and not to a sudden and imminent emergency as contemplated by law, to which refusal, plaintiff duly excepted and attempted to outline fully the grounds therefor.

11. The Court erred in finding and ruling in effect that the law of the District of Columbia did not control on the issues of extraordinary care, presumptions and inferences of law and the doctrine of sudden emergency to which plaintiff duly excepted and noted exceptions and grounds therefor.

12. The Court erred in refusing to poll the jury on the issue of whether the jury considered contributory negligence in finding for the defendant where the foreman of the jury indicated to the Court, before the verdict, that the jury had a question on contributory negligence and would present same to the Court in writing, but did not; where no instruction was requested or given on that issue; where the evidence did not support submission of same to the jury; and where plaintiff requested the Court to poll the jury on the question of contributory negligence as being considered in their verdict; to which plaintiff noted her exceptions with grounds.

WHEREFORE, plaintiff, Blanche H. Lober, by Counsel, moves the Court to set aside the verdict of the jury for the Defendant, Arlington Yellow Cab Co., Inc., and enter a judgment notwithstanding the verdict for the plaintiff with a retrial on the issue of damages to plaintiff only; or, in the alternative, moves to set aside the verdict for the defendant and grant upon the said setting aside of said verdict a new trial on all issued to the plaintiff.

Respectfully submitted:

BLANCHE H. LOBER

By Counsel

/s/ Ronald D. Hartshorn

[Exhibit D]

ORDER

This case came on to be heard the 19th day of June, 1967, the date having been changed from the previously docketed date of June 20, 1967 by agreement of counsel and the Court, on plaintiff's Motion to Set Aside Verdict and for Judgment for the Plaintiff Notwithstanding the Verdict and Motion to Set Aside Verdict and for a New Trial, whereupon counsel for the parties did appear and did argue the motions.

And it appearing to the Court that there are insufficient grounds to disturb the jury's verdict, it is hereby ORDERED, ADJUDGED and DECREED that plaintiff's Motion to Set Aside verdict and for Judgment for the Plaintiff notwithstanding the Verdict and Motion to Set Aside Verdict and for a New Trial be and they hereby are, denied and, further, that judgment be, and hereby is, entered in favor of the defendant, Arlington Yellow Cab Co., Inc., and against the plaintiff Blanche H. Lober and the case dismissed, to which said denial of motions and entry of judgment for defendant on the jury's verdict the plaintiff, by counsel, has duly noted her objections and exceptions.

This Order is final and the Clerk of this Court is hereby authorized and directed to deliver a certified copy to counsel for the parties forthwith.

JA 16

Entered this 23rd day of June, 1967.

/s/ PAUL D. BROWN
Judge

Seen:

RONALD D. HARTSHORN
Counsel for Plaintiff

FRED C. ALEXANDER
Counsel for Defendant

A COPY
TESTS:

H. BRUCE GREEN, CLERK
BY: FREDA S. WOODYARD
Deputy Clerk

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BLANCHE H. LOBER,

Plaintiff

v.

Civil Action No. 1779-67

WILLIS MOORE,

Defendant

OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT

Comes now the Plaintiff, Blanche H. Lober, by counsel, and opposed the Defendant's Motion for Summary Judgment, and moves this Court to deny the said Motion for the following reasons:

1. The Judgment of the Circuit Court of Arlington County, Virginia, At Law No. 11,012, was not res judicata to the present cause.
2. The parties to the aforesaid Arlington suit were not the same parties and the judgment of the said Court was not legally binding upon the defendant here, Willis Moore, and could not be asserted as a defense by him in this case, in view of the fact that at the time of trial, he was not a party to the cause and was before the Court as a witness for the Defendant, Arlington Yellow Cab Company, Inc., the sole defendant served in that cause and who legally appeared therein.
3. The judgment of the Court was entered generally in favor of the Arlington Yellow Cab Company, Inc. only.
4. Virginia law permits the plaintiff to file and proceed separately against joint tort feorsors as appears in Section 8-368, Code of Virginia, 1950, as amended:

"A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment against them successively until judgment has been rendered against, or the cause has been otherwise disposed of as to all of the defendants, and no bar shall arise as to any of them by reason of a judgment against another or others until the judgment has been satisfied. If there be separate judgment against different defendants for a joint wrong, the plaintiff elects which of them he will prosecute, but the payment or satisfaction of any one of such judgments shall be a discharge of all, except as to the costs."

5. The defendant, Willis Moore, was not an identical party to the Arlington County case, nor was he privy thereto, was not bound by the judgment therein and not entitled to interpose the doctrine of res judicata, in the present case.

WHEREFORE, Plaintiff opposes the Motion for Summary Judgment filed by the Defendant and prays that same be denied.

BLANCHE H. LOBER,
By Counsel

/s/ ROLAND D. HARTSHORN
Attorney for the Plaintiff

[Certificate of Service dated January 5, 1968]

ORDER

Upon consideration of the defendant's Motion for Summary Judgment, and of the record herein, and after argument of counsel on January 30, 1968, it is this *20th* day of *February, 1968*,

ORDERED, that the Motion be and is hereby granted, and judgment entered for the defendant.

/s/ ALEXANDER HOLTZOFF
Judge

[Certificate of Service dated February 2, 1968]

NOTICE OF APPEAL

Notice is hereby given this *11th* day of *March, 1968*, that Plaintiff, Blanche H. Lober, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the *23rd* day of *February, 1968*, in favor of the defendant, Willis Moore, against said plaintiff, Blanche H. Lober.

/s/ ROLAND D. HARTSHORN
Attorney for Plaintiff

BRIEF OF APPELLEE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,830

BLANCHE H. LOBER,
Appellant,

v.

WILLIS MOORE,
Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 21 1968

Nathan J. Paulson
CLERK

WILLIAM CLAGUE
FRANCIS C. O'BRIEN

1730 Rhode Island Ave., N.W.
Washington, D.C. 20036

Attorneys for Appellee

(i)

STATEMENT OF QUESTIONS PRESENTED

Appellant's statement of questions presented is correct generally, except, that Appellee believes that the doctrine barring this action is more appropriately termed "collateral estoppel" instead of *res judicata*, and, in part III of Appellant's statement, the problem is treated as an ordinary *res judicata* question, when the courts of Virginia and the federal courts have considered this type of case under different rules.

(iii)

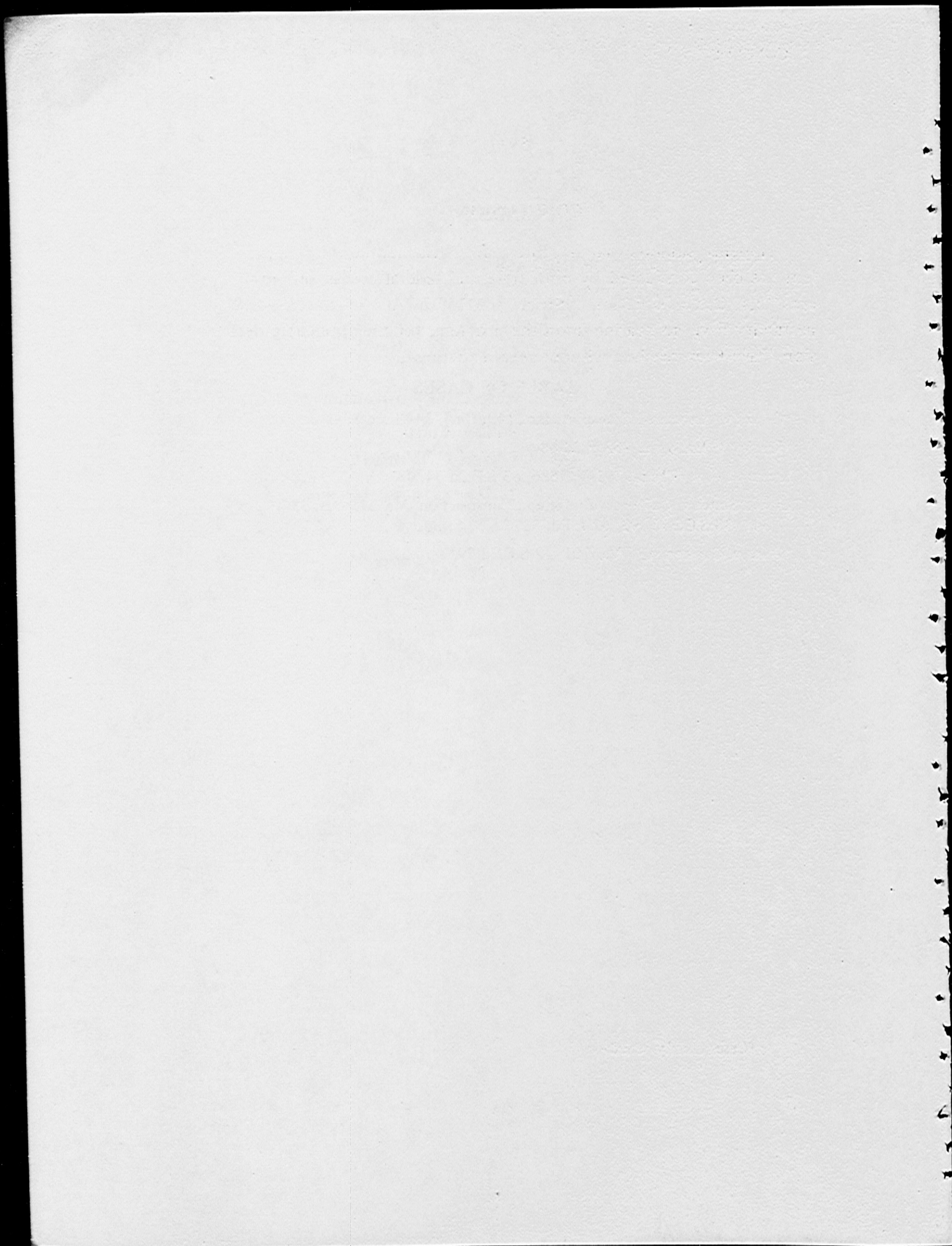
INDEX

COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
CONCLUSION	5

TABLE OF CASES

*Graves v. Associated Transport, Inc., (4th Cir.), 344 F.2d 894	3
*Kinsley v. Markovic, 333 F.2d 684	4
Pittston Co. v. O'Hara, 191 Va. 886, 63 S.E.2d 34, 43	3
United States v. California Bridge and Construction Co., 245 U.S. 337, 341, 38 S.Ct. 91, 93, 62 L.Ed. 332	4
*Ward v. Charton, 177 Va. 101, 12 S.E.2d 791	4

*Cases chiefly relied on.



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,830

BLANCHE H. LOBER,
Appellant,

v.

WILLIS MOORE,
Appellee.

*APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

BRIEF OF APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellee takes issue with the allegations of negligence in Appellant's statement, but the Statement of the Case is generally adequate for the purposes of this appeal.

SUMMARY OF ARGUMENT

The case tried and concluded by final judgment in Arlington County, Virginia necessarily involved the identical questions that Appellant seeks to try again in the District Court. Regardless of whether the question is considered as an application of the doctrine of *res judicata* or of collateral estoppel, the applicable decisions recognize that allowing the plaintiff to proceed in such cases allows a second litigation of essentially the same case. Rules and statutes permitting separate suits against separate tortfeasors obviously must be construed as referring to tortfeasors that are not related as principal and agent or in any way that in effect makes the act of one the act of both. These rules and statutes contemplate persons committing different or separate acts. This problem has twice been considered by the United States Court of Appeals for the Fourth Circuit in recent times and each time that Court, examining Virginia decisions, has ruled adversely to Appellant's contentions here.

ARGUMENT

Whether the law of Virginia or the law of this jurisdiction is controlling here, the Appellee makes no assertion on that point, the position taken by Appellant has twice been considered and found wanting by the United States Court of Appeals for the Fourth Circuit. The result would be the same whether we proceed under Virginia statute or the Federal Rules of Civil Procedure.

I

Appellant urges that she was forced to try her case against a defendant against whom the jury was less likely to return a verdict, a "remote" defendant, one liable only because of respondent superior, and not the active tortfeasor. If this were a problem, Appellant could have sued the present defendant here before proceeding to

judgment in Arlington. We suggest however, that Appellant was quite satisfied with having her initial try at the deep pocket, the corporate defendant, and that her efforts against the individual cab driver are only resorted to as a second choice. Given the choice, most trial counsel would elect to proceed against a corporate defendant. The anonymity and apparent wealth imparted by a corporate name is regarded by many as an invitation to generosity on the part of the jury. The reasoning cited by Appellant plainly deals with a different situation.

II

The doctrine of mutuality of estoppel discussed in *Pittston Co. v. O'Hara*, 191 Va. 886, 63 S.E.2d 34, 43 has also been discussed in *Graves v. Associated Transport, Inc.*, (4th Cir.). 344 F.2d 894. There, where a truck driver sued and prevailed, his employer was allowed to use the defense of *res judicata* in a suit by the motorist originally sued by the employee. In a rather lengthy and well considered opinion the United States Court of Appeals for the Fourth Circuit said that the mutuality rule was not a solid wall, and that Virginia decisions turn on their particular circumstances, that there is a public interest in seeing litigation come to an end, and hence, that court ruled adversely to Appellant's contentions here.

The rules and statutes relied upon by Appellant contemplate suits against tortfeasors that are separate or unrelated, as in the case of the drivers of two different automobiles, the several perpetrators of a joint assault, a negligent manufacturer and a negligent user of some device, or the like. However, we maintain that when, as here, one defendant is liable, if at all, only by operation of law, and not by his having actually joined in the commission of the alleged act, one trial of the single issue of negligence must end the matter. If Willis Moore was negligent, his superior was negligent by operation

of law, but the negligence of the superior is the exact same act with which Willis Moore is charged. The negligence of Willis Moore was the issue tried by the Virginia jury, and they found no negligence, for his superior was given their verdict. If this case is tried again the same testimony about the same issues will win or lose the case.

Kinsley v. Markovic, 333 F.2d 684, the United States Court of Appeals for the Fourth Circuit considered a practically identical case and ruled that the doctrine of "estoppel by judgment" prevented the plaintiff there from proceeding against the cab driver, when in an earlier suit by the same plaintiff for the same occurrence, the cab company had prevailed. In very apt language the Court stated that, "plaintiff sought a second try at the pot of gold by bringing an action against the taxicab driver * * * *"

"The plaintiff has had his day in Court. The substantive issue of (defendant's) alleged fault as the proximate cause of plaintiff's injury has been fully tried and determined. The plaintiff is not entitled to have it tried afresh."

Also quite similar is *Ward v. Charton*, 177 Va. 101, 12 S.E.2d 791, where an adverse decision to plaintiff in an action against the driver was held to bar an action against the owner.

The doctrine of *res judicata* or estoppel by judgment, was also considered by the Supreme Court, which has said, "[It] proceeds upon the principle that one person shall not the second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in personam in a former suit." *United States v. California Bridge and Construction Co.*, 245 U.S. 337, 341; 38 S.Ct. 91, 93; 62 L.Ed. 332.

CONCLUSION

Appellee submits that the rule that is attached here by Appellant has been considered by both state and federal courts and governs this factual situation. Strict rules of privity or the rule of mutuality have no bearing upon the problem, for the applicable decisions have been reached without regard to them.

Respectfully submitted,

William Clague

Francis C. O'Brien

Attorneys for Appellee